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ATTORNEY FOR APPELLEES:

GREGORY E. STEUERWALD
Steuerwald, Zielinski & Whitham
Danville, Indiana

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BAILEY, Judge

Case Summary

Appellant-Petitioner Deanna Thompson Stull appeals the grant of summary judgment in favor of Appellees-Respondents the Larry L. Thompson Revocable Trust, Derek Thompson and Vicki Thompson Craver (“the Appellees”). We reverse and remand.

Facts and Procedural History

The facts set out in an interlocutory appeal are as follows:

Thompson created the Larry L. Thompson Revocable Trust (the “Thompson Trust”) on November 6, 1991, appointing himself as the sole trustee. He then married Stull on November 30, 1996. At the time they were married, Thompson worked for R.R. Donnelley & Sons Company (“R.R. Donnelley”). He retired soon after in December 1996 and subsequently received a retirement package in the mail from R.R. Donnelley’s office in Downers Grove, Illinois.

On December 26, 1996, Thompson executed an R.R. Donnelley employee savings program beneficiary election. He designated the Thompson Trust as the beneficiary of his employee savings plan accounts. The trust^[1] designated Stull along with Thompson’s children from a previous relationship, Derek Thompson (“Derek”) and Vicki Thompson (“Vicki”), as co-successors. On the same day, Stull signed a “Consent to Beneficiary Designation” form at her and Thompson’s home. On the first page of the consent form, Thompson had designated the Larry L. Thompson Revocable Trust as his beneficiary for both his Voluntary Savings Fund and Deferred Compensation Savings plan. On the second page of the consent form Stull signed the provision that stated:

I am aware that my spouse, Larry L. Thompson, has designated the above beneficiary under the Donnelley Employee Savings Program. I understand that as long as we remain married, I am entitled to be the beneficiary under this plan unless I consent to the above election, and that without my consent, any death benefits would be payable to me as surviving spouse.

Knowing that death benefits will be paid to the above named beneficiary and not to me, I consent to this beneficiary designation under the Donnelley

¹ We assume “trust” here refers to that of the employee savings program, because Stull is not a beneficiary nor mentioned in the Thompson Trust.

Employee Savings Program.

Appellant's App. p. 95.

Stull alleges that she signed and dated the Consent to Beneficiary Designation form on December 26, 1996, "in exchange for the promise that she would be a one-third beneficiary of the [Thompson] Trust." Br. of Appellee at 1. The space on the form providing for the signature of a plan witness or notary was left blank. Stull then personally packaged, sealed, and mailed the forms to the Des Plaines office of R.R. Donnelley. R.R. Donnelley never notified Thompson that there was a problem with the beneficiary designation forms.

Thompson died on February 13, 1998. Upon his death, Derek and Vicki sought payment from the Thompson Trust. At this time, R.R. Donnelley realized that Stull's signature on the spouse's consent form had not been witnessed or notarized. The company contacted Stull and Derek and proposed that Kim Keeling ("Keeling"), a plan representative, witness a re-signing of Stull's waiver. On April 17, 1998, Stull acknowledged and verified her prior signature on the original consent waiver in the presence of Keeling. . . . After this meeting, R.R. Donnelley distributed the funds to the Thompson Trust.

On December 16, 1999, Stull filed a petition in equity to impose a trust, or in the alternative to set aside and revoke consent to transfer and to obtain repayment of funds against Derek, Vicki, and the Thompson Trust (collectively the "Trust"). Stull moved for partial summary judgment on March 2, 2002, alleging that her signature was not properly witnessed or notarized as required by ERISA. The trial court granted partial summary judgment on August 2, 2002.

The Trust filed a motion to set aside summary judgment and its own motion for summary judgment on August 8, 2003. A hearing was conducted on November 16, 2005, after which the trial court denied the Trust's motions. The trial court concluded that the failure of Thompson and the Trust to properly execute the necessary documents could not be cured after Thompson's death.

The Trust filed a motion to certify for interlocutory appeal and stay proceedings on December 20, 2005, which the trial court certified on January 16, 2006. We accepted jurisdiction of this interlocutory appeal on April 4, 2006, and the Trust filed its notice of appeal on April 18, 2006.

In re Larry L. Thompson Revocable Trust, 856 N.E.2d 1252, 1253-54 (Ind. Ct. App. 2006), reh'g denied, trans. denied.

On interlocutory appeal, this Court reversed the trial court's grant of partial summary judgment, holding that the waiver of rights was valid under ERISA. Id. at 1259. On remand, the Trust, Derek and Vicki filed a Motion to Enter Final Judgment Consistent with the Decision of the Indiana Court of Appeals. The trial court granted summary judgment as to the issue of the validity of Stull's consent, but denied an entry of final judgment because the Court of Appeals had not addressed the issue of whether a constructive trust should be imposed due to the circumstances under which Stull consented to the change of beneficiary. The Trust, Derek and Vicki then filed a Motion for Summary Judgment on the equitable claim, which the trial court granted. This appeal ensued.

Discussion and Decision

I. Standard of Review

Our standard of review for summary judgment is the same as that used in the trial court. Harco, Inc. of Indianapolis v. Plainfield Interstate Family Dining Assoc., 758 N.E.2d 931, 937 (Ind. Ct. App. 2001). Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. Bilimoria Computer Systems, LLC v. America Online, Inc., 829 N.E.2d 150, 155 (Ind. Ct. App. 2005). We view the facts and reasonable inferences drawn

therefrom in the light most favorable to the non-moving party. Kennedy v. Guess, Inc., 806 N.E.2d 776, 779 (Ind. 2004).

Although a trial court's decision is "clothed with a presumption of validity," the reviewing court must carefully assess the decision to ensure that the non-movant was not wrongly denied his or her day in court. Id. On appeal, the non-movant bears the burden of demonstrating that the grant of summary judgment was erroneous. Id.

II. Analysis

In addressing this appeal, we believe it necessary to go back to the very beginning to Stull's petition and the basic facts developed in the record. Larry executed the Trust and his will, which incorporated the Trust, in November of 1991. The Trust named Derek and Vicki, Larry's children from a prior marriage, as the remainder beneficiaries and co-successor trustees. The will appointed Derek and Vicki as co-Personal Representatives. Stull's petition alleges that prior to and during their marriage that Larry informed her that it was his desire that Stull, Derek and Vicki be equal beneficiaries and trustees of the Trust. Stull alleged that it was upon this basis that she signed the consent form on December 26, 1996, to change the beneficiary of Larry's employee savings program ("Empl. Savings") from the default of the employee's spouse, herself, to the Trust.

Stull's petition asserts that, in Derek's presence, Larry made statements of his desire that Stull share equally in the Trust remainder and that Derek indicated his agreement. The Appellees deny that Larry ever made such declaration to Derek. Rather, they contend that Larry instructed Derek to permit Stull to live in the marital residence as long as she wanted and to help Stull financially when needed. Larry never changed the terms of the Trust.

After Larry died in 1998, Stull and Derek received notification from R.R. Donnelley that Stull needed to re-sign the consent form in order for the Empl. Savings fund to be released to the Trust. Derek drove Stull to R.R. Donnelley's to re-sign the necessary documents. Stull's petition alleges that she re-signed the consent form with the belief that Derek and Vicki agreed to and intended to honor Larry's alleged instruction that Stull be an equal beneficiary of the Trust. When it was apparent that Derek and Vicki were not going to treat Stull as an equal beneficiary, Stull filed her petition seeking relief of either the imposition of a constructive trust or the revocation of her consent to the change in beneficiary of the Empl. Savings.

Upon these facts and allegations, summary judgment was granted in favor of the Appellees. The trial court did not provide reasons supporting the grant of summary judgment.

The issue before us is whether the Appellees are entitled to judgment as a matter of law on Stull's claim of constructive fraud upon which she seeks to impose a constructive trust. Constructive fraud "arises by operation of law from a course of conduct which, if sanctioned by law, would 'secure an unconscionable advantage, irrespective of the existence of evidence of actual intent to defraud.'" Paramo v. Edwards, 563 N.E.2d 595, 598 (Ind. 1990) (quoting Beecher v. City of Terre Haute, 235 Ind. 180, 184-85, 132 N.E.2d 141, 143 (1956)). The concept encompasses situations that do not amount to actual fraud, but are "so likely to result in injustice that the law will find a fraud despite the absence of fraudulent intent." Scott v. Bodor, Inc., 571 N.E.2d 313, 324 (Ind. Ct. App. 1991).

"A plaintiff alleging the existence of constructive fraud has the burden of proving the

existence of a duty owing by the party to be charged to the complaining party due to their relationship, and the gaining of an advantage by the party to be charged with fraud.” Morfin v. Estate of Martinez, 831 N.E.2d 791, 802 (Ind. Ct. App. 2005). A duty may arise by the existence of a fiduciary relationship.² Strong v. Jackson, 777 N.E.2d 1141, 1147 (Ind. Ct. App. 2002), trans. denied. “A confidential or fiduciary relationship exists when confidence is reposed by one party in another with resulting superiority and influence exercised by the other.” Kalwitz v. Estate of Kalwitz, 822 N.E.2d 274, 281 (Ind. Ct. App. 2005), trans. denied. “The question of whether a confidential relationship exists is one of fact to be determined by the finder of fact.” Id.

The parties’ arguments are directed at whether Derek had a confidential or fiduciary duty to Stull, both citing to constructive fraud cases such as Kalwitz v. Estate of Kalwitz and Morfin v. Estate of Martinez. They concentrate this evaluation on the time period when Derek took Stull to re-sign the consent form. However, the parties involved in this litigation do not hold analogous positions to those of the parties in Kalwitz and Morfin and thus the analysis in these cases does not fit squarely with the facts presented here. The basic scenario in these cases is that T (“Transferee”) promises D (“Decedent”) to hold property of D that T will give to B (“Beneficiary”) at some point in time, usually after D has died. T then fails to transfer the property to B as promised. D has since died and the Estate of D brings an action against T to enforce the promise through the remedy of a constructive trust under the theory of constructive fraud. In determining whether constructive fraud has occurred, the courts

² A duty may also exist if there is a buyer and seller, where one party may possess knowledge that is unknown by the other and may as a result enjoy a position of superiority. Strong v. Jackson, 777 N.E.2d 1141, 1147

analyzed whether there was a confidential or fiduciary duty owed by T, the party to be charged with constructive fraud, to D, the complaining party represented by D's estate. See Kalwitz, 822 N.E.2d at 280-282; Morfin, 831 N.E.2d at 802.

Here, a purported Beneficiary, Stull, is suing the alleged Transferee, Derek, to enforce his promise to the Decedent, Larry, rather than Larry's estate ("Estate"). The fact that Derek, along with Vicki, is the representative of the Estate as well as a remainder beneficiary of the Trust sheds light on why the Estate would not bring such a lawsuit; it is contrary to the interests of the Estate representatives. Obviously, one cannot expect Derek, as personal representative of the Estate and beneficiary under the Trust to sue himself in his personal capacity to pursue a constructive fraud claim on behalf of Larry. Because the interests of the Beneficiary, Stull, and the Decedent, Larry, are similar, Stull would be in the best position to pursue a constructive fraud claim on behalf of Larry. Based on these unique circumstances, we believe Stull is entitled to bring a claim of constructive fraud against Derek due to an alleged duty he owed to Larry.

"A confidential or fiduciary relationship exists when confidence is reposed by one party in another with resulting superiority and influence exercised by the other." Kalwitz, 822 N.E.2d at 281. "The question of whether a confidential relationship exists is one of fact to be determined by the finder of fact." Id. There is enough evidence in the record to create a genuine issue of material fact as to whether Derek had a confidential relationship with his father, Larry. Derek lived only eight houses away from Larry. Despite Derek and Vicki being Estate representatives and trustees of the Trust, Larry gave only to Derek the directions

(Ind. Ct. App. 2002), trans. denied.

of how to handle the Trust assets. In fact, Vicki was not aware that the Trust existed until after Larry's passing. Based on these facts, the determination of the existence of a confidential relationship between Derek and Larry should be left to the fact finder.

In addition to this question of fact, the fact finder will be faced with the factual issue of determining the true content of Larry's directions to Derek and whether Derek agreed to carry them out. Because these genuine issues of material fact exist, summary judgment was not appropriate. We therefore reverse and remand for further proceedings.

Reversed and remanded.

FRIEDLANDER, J., concurs.

KIRSCH, J., dissents without opinion.